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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 588.

PERRY ZIMMERMAN,

Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY OF NEWARK and EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT.

REPLY BRIEF OF PETITIONER AND SUPPLEMENTAL APPENDIX.

WARREN J. KAPS,
26 Journal Square,
Jersey City 6, New Jersey,
DANIEL H. POLLITT,
Chapel Hill, North Carolina,
SEYMOUR MARGULIES,
921 Bergen Avenue,
Jersey City, New Jersey,
NICHOLAS J. LAROCCA,
26 Journal Square,
Jersey City 6, New Jersey,
Attorneys for Petitioner.

STEIN, KRIPKE & ROSEN,
Of Counsel.
WARREN J. KAPS,
GEORGE L. GARRISON,
On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.—MArket 3-4994

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REPLY BRIEF OF PETITIONER.

This Reply Brief is submitted in response to the Respondents' Brief in Opposition. It is significant that the Respondents at no time deny the importance of the constitutional issues raised by the Petition. Instead, the Respondents claim that the acquisition of tenure is dependent upon the New Jersey tenure statute exclusively, devoid of any federal constitutional considerations. Further, the Respondents claim that even if important constitutional issues exist, they were not asserted properly during the proceedings at the state level. Not only are both contentions by the Respondents erroneous, but they are in direct contradiction of the record below.

It is true that the mode of acquisition of tenure is dependent upon state laws and regulations. But may the state prevent a teacher from acquiring tenure in the ordinary course of his employment, when the reason, and the sole reason, for not granting tenure is the fact that the teacher exercised his constitutional privileges before a Congressional Sub-Committee? Such state action, it is charged, violates due process and abrogates First Amendment rights. The Respondents' myopic viewpoint of teacher employment rights must be rejected. State action which arbitrarily deprives a teacher of his employment rights must, of necessity, raise federal questions.

We need not repeat the various unconstitutional activities of the Respondents which resulted in the denial to the Petitioner of his tenure rights. Our constitutional argument before this Court is, in essence, the same argument urged continuously before the state courts and administrative agencies. The initial proceedings against Mr. Zimmerman, which involved his automatic dismissal without a hearing to explain his conduct before the House Sub-Committee, were set aside by the New Jersey Supreme Court on the basis that Respondents violated the principles established by this Court in *Slochower* v. *Board of Education*, 350 U. S. 551 (1956). See the decision of the New Jersey Supreme Court in *Laba* v. *Newark Board of Education*, 23 N. J. 364, 129 A. 2d 273 (1957).

In subsequent proceedings before the Superintendent and the Newark Board of Education, the important constitutional issues raised by the Petition came into sharp focus. At the conclusion of these proceedings, no decision was made as to whether or not Zimmerman's use of the

Fifth Amendment was frivolous or contumacious. It was apparent that the refusal to recognize Zimmerman's tenure rights resulted from his exercise of constitutional privileges. The constitutional issues pertaining to tenure which are presented to this Court were asserted before the Commissioner of Education. These federal rights were delineated in the Petition of Appeal to the Commissioner of Education (see supplemental appendix attached hereto). In paragraph 3 of said Petition of Appeal, exception was taken to the Board's order, in that:

> "3. By the order aforesaid, the Board of Education of Newark violated the constitutional rights of the appellant under the Federal and New Jersey Constitutions, including the right to due process of law, freedom of speech and association, and other rights protected by the Fourteenth Amendment of the Federal Constitution and the rights guaranteed by the New Jersey State Constitution, * * *."

Further constitutional objections were urged in paragraphs 5 and 15 of the Petition of Appeal, and all of these objections were lodged with respect to the issue of reinstatement which, of necessity, carried with it tenure.

The denial of constitutional rights as they related to the issue of tenure was timely and sufficiently raised before the state court. The federal right need not be raised in any special or particular form. It suffices if the federal issue is relied upon and in a proper manner called to the state court's attention. See *Water Power Co.* v. *Street Railway Co.*, 172 U. S. 475 (1899) and *St. Louis I. M. T. & So. Ry. Co.* v. *Starbird*, 243 U. S. 592 (1917).

In *Braniff Airways* v. *Nebraska Board*, 347 U. S. 590 (1954), this Court held that a federal right or issue is

sufficiently presented even though reference to a specific portion of the federal constitution is omitted or the reference is incorrect. The important inquiry is whether the substance of the federal right was presented and contained in the record before the state tribunal.

Any doubt as to the adequacy of the raising of the federal questions is removed by examination of the opinion of the New Jersey Supreme Court (App. C, p. 31). While the opinion of the New Jersey Supreme Court is concerned primarily with state issues, that Court did consider the federal issues. In the opinion of the Court by Justice Schettino, we find the following reference to Zimmerman's constitutional arguments:

> "In his view, he is entitled to tenure because continued employment would have taken place but for the fact that he invoked before a Congressional subcommittee the protection afforded by the Fifth Amendment." (App. C at p. 31).

In Chief Justice Weintraub's concurring opinion, the federal issue is stated as follows:

> "The question is whether it is unreasonable to refuse to employ an individual because he claimed the privilege from self-incrimination." (App. C at p. 46),

Can there be any doubt that the federal issues were properly raised? The mention of the federal rights in the court's opinion below is sufficient in and of itself to preserve these issues for the purposes of this Petition. If the highest state court considers that the federal question was properly presented before it, then a further inquiry as to when or in what manner it was raised becomes unnecessary.

Water Power Co. v. *Street Railway Co., supra; Bryant* v. *Zimmerman*, 278 U. S. 63 (1928); *Indiana ex rel Anderson* v. *Brand*, 303 U. S. 95 (1938) and *Charleston Ass'n* v. *Alderson*, 324 U. S. 182 (1945).

Conclusion.

For the reasons hereinabove stated and as stated in the Petition for a Writ of Certiorari heretofore filed with this Court, this Petition for a Writ of Certiorari to the New Jersey Supreme Court should be granted.

Respectfully submitted,

WARREN J. KAPS,
26 Journal Square,
Jersey City 6, New Jersey.

SEYMOUR MARGULIES,
921 Bergen Avenue,
Jersey City 6, New Jersey.

NICHOLAS J. LAROCCA,
26 Journal Square,
Jersey City 6, New Jersey.

DANIEL H. POLLITT,
Chapel Hill, North Carolina,
Attorneys for Petitioner.

STEIN, KRIPKE & ROSEN,
Of Counsel.

WARREN J. KAPS,
GEORGE L. GARRISON,
On the Brief.

SUPPLEMENTAL APPENDIX.

Petition of Appeal to Commissioner of Education.

To the Commissioner of Education
of the State of New Jersey:

The appellant, Perry Zimmerman, of the City of Newark, County of Essex, and State of New Jersey, says:

1. The Board of Education of Newark, by its order dated June 24, 1958, unlawfully and improperly dismissed the appellant from its employ as of May 20, 1955; and without limiting the generality of the foregoing, appellant further states:

2. By the order aforesaid, the Board of Education of Newark violated the provisions of N. J. S. A. 18:13-17 in that the appellant's dismissal was not for inefficiency, incapacity, or conduct unbecoming a teacher, or other just cause.

3. By the order aforesaid, the Board of Education of Newark violated the constitutional rights of the appellant under the Federal and New Jersey Constitutions, including the right to due process of law, freedom of speech and association, and other rights protected by the Fourteenth Amendment of the Federal Constitution and the rights guaranteed by the New Jersey State Constitution, including, *inter alia*, Article I, Section I, guaranteeing due process of law; Article I, Section 6, guaranteeing liberty of speech; and Article I, Section 18, guaranteeing freedom of assembly.

4. By the order aforesaid, the Board of Education of Newark violated the principles and rules laid down by the Supreme Court of New Jersey in the case of *Laba v. Newark Board of Education*, 23 N. J. 364 (1957), in that the questions propounded by the Superintendent of Schools

upon which the Board has acted were not pertinent to any inquiry within the lawful right of the Superintendent of Schools or the Board of Education.

5. The hearing conducted by the Board of Education of the City of Newark denied to the appellant (a) a fair hearing as required by due process of law, and (b) his right to a hearing under N. J. S. A. 18:13-17 in that at no time was the appellant permitted to ascertain the respects, if any, in which the questions propounded by the Superintendent of Schools were pertinent to any inquiry which the Superintendent had a lawful right to make, notwithstanding repeated efforts by the appellant to ascertain their pertinency.

6. The Board of Education by its order aforesaid failed to give proper effect to the entire record of excellence of the appellant as a teacher.

7. Under any circumstances, the Board of Education by its order aforesaid, insofar as the said order upheld the appellant's dismissal as of May 20, 1955, violated the constitutional and statutory rights of the appellant.

8. The decision and judgment of the Board made on the 24th day of June, 1958, are not adequately supported by the record nor is there substantial evidence thereof.

9. The Board materially erred to the prejudice of the appellant in naming, constituting, and sanctioning Edward F. Kennelly as the hearing examiner.

10. The hearing examiner did not conduct a completely impartial, unprejudiced, and lawful hearing. The Board failed and neglected to make an independent inquiry as to the facts and improperly relied upon the conclusions, analysis, and special report of the Superintendent of Schools. The special report of the Superintendent of Schools manifests that matters were considered by the

Superintendent apart from the issues embraced in the mandate on the remand from the Supreme Court of New Jersey; the report further manifests that the hearing officer engaged in purely subjective considerations devoid of any reasonable standard in reaching findings and conclusions.

11. The proofs manifest that the hearing officer engaged ex parte in an investigation without notice to the appellant with respect to which the appellant has had no opportunity of participation or hearing. The conclusions, findings, and determinations of the Superintendent of Schools and of the Board were the result of whim, caprice, and prejudice; they were based upon purely subjective considerations and not on the violation of any ascertainable objective or of conduct.

12. The record before the Superintendent and before the Board exonerates the appellant and constitutes the basis for his reinstatement.

13. Prejudicial error was committed by permitting the charges of May 23, 1955, to be subsequently supplemented.

14. The findings of the Board do not support its conclusions.

15. The findings and conclusion of the Board are ultra vires and contrary to the statutes and rules in such case made and provided and the mandate of the Supreme Court and its opinion as reported in *Laba* v. *Board of Education of Newark, supra,* and constitute a violation of the "due process," "equal protection," and "privilege against self-incrimination" provisions of the State Constitution, and of the "due process" and "equal protection" provisions of the Federal Constitution.

WHEREFORE, appellant prays that an order be issued by the Commissioner of Education directing the reinstatement

of the appellant to his former position as teacher with the Newark Board of Education, with back pay to May 20, 1955.

LEVY, LEMKEN & MARGULIES,
Attorneys for Appellant,
By SEYMOUR MARGULIES,
A Member of the Firm.

MAURICE C. BRIGADIER,
Associate Counsel.

Affidavit of Perry Zimmerman.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } ss.:

PERRY ZIMMERMAN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

1. I am the appellant in the above entitled cause, and the statements contained in the foregoing petition of appeal are true to the best of my knowledge and belief.

PERRY ZIMMERMAN.

Sworn and subscribed before me }
this 19th day of August, 1958. }

BERNICE B. FIELD.